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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1975

No. 75-1092

PIHER INTERNATIONAL CORPORATION and PIHER SOCIEDAD ANONIMA,

Petitioners,

vs.

CTS CORPORATION,

Respondent.

SUPPLEMENTAL BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Since the filing of their Petition for Writ of Certiorari, Petitioners' attention has been directed to a recent decision by the Board of Appeals of the United States Patent and Trademark Office, relevant to the instant Petition, which it is believed should be called to the attention of the Court. This decision is *Ex parte Leonard and Brandes*, dated September 19, 1974 and it is published in the advance sheets of the *United States Patents Quarterly* at 187 USPQ 122, under date of October 13, 1975. It is asked that the Court, within its discretion, consider this case in connection with the instant Petition. For the convenience of the Court, a copy of the

Board of Appeals decision in *Ex parte Leonard and Brandes* is attached hereto as Appendix G.

Ex parte Leonard and Brandes points up two material matters:

1. There is confusion and conflict between the Circuits as to the point of law presented for consideration by the instant Petition.
2. The decision by the United States Court of Appeals for the Seventh Circuit, to which the instant Petition relates, is in conflict with the decision by this Court in *General Electric Co. v. Jewel Incandescent Lamp Co.*, 326 U.S. 242, (1945).

In *Ex parte Leonard and Brandes*, claim 25 (Appendix page G-2), which was rejected by the Examiner and was on appeal before the Board, recites an "adhesive composition" composed of certain components, and possessing the capability of "(b) adhering together two substrates submerged in water". The majority of the Board, after considering the prior art reference to Joyner et al, 2,784,127, reversed the rejection of the Examiner, saying (Appendix page G-2):

> "From this it might be said that the combination of materials reflected in appellants' invention, broadly speaking, is *prima facie obvious*. However, we fail to find any suggestion from the collective teachings before us that a paste mix having the combination of monomer and filler as claimed would be suitable for laminating *under water*." (emphasis added).

The conclusion thus reached by the Board is on all fours with the conclusion reached by the Seventh Circuit Court of Appeals in the instant case, wherein the court found (see Petition for Certiorari, page 8) that a structural combination, otherwise obvious, is rendered non-obvious, and hence patentable, because it accomplishes an additional non-obvious function.

Acting Examiner-in-Chief McKelvey, dissented from the foregoing conclusion reached by the majority of the Board, and his decision begins in the Appendix hereto attached at Appendix page G-1.

At Appendix page G-4, Examiner McKelvey states:

> "I agree with appellants, on this record, one skilled in this art would not have expected appellants' adhesives to be useful under water. However, this unexpectedness does not, in my opinion, render the claimed subject matter, as a whole, non-obvious. On the basis of the prior art, one skilled in this art would surely have recognized that the claimed adhesives are useful 'above water' even if that person would not have expected the claimed adhesives to be useful 'under water'."

Examiner McKelvey goes on to say (Appendix page G-4):

> "The majority reverses, as I understand the decision, because of the 'additional' unexpected property which appellants have discovered in what I regard as an otherwise obvious composition."

Importantly, Chief Examiner McKelvey points out (Appendix page G-4) that although the decision by the majority finds support in two recent decisions by the Court of Customs and Patent Appeals,[1] the majority opinion is in conflict with the decision by this Court in *General Electric Co. v. Jewel Incandescent Lamp Co.*, supra, as well as with decisions in the Second and Third Circuits.[2]

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[1] *In re Murch*, 59 CCPA 1277, 454 F.2d 1051, (1972); and *In re Costello*, 480 F.2d 894, (CCPA 1973).

[2] *General Radio Co. v. Superior Electric Co.*, 321 F.2d 857, 862, (Third Cir. 1963); *Preuss v. General Electric Co.*, 392 F.2d 29, 33-34, (Second Cir. 1968).

Thus Examiner McKelvey finds, and we agree, that there is confusion among the courts and, specifically, that there is conflict between the decisions of the Court of Customs and Patent Appeals, on the one hand, and the decisions of this Court and the Second and Third Circuits, on the other. We now further submit, that the decision by the Seventh Circuit in the instant case aligns with those of the Court of Customs and Patent Appeals, but that it is in conflict with the decision of this Court in *General Electric Co. v. Jewel Incandescent Lamp Co.*, supra.

Examiner McKelvey quotes a passage from the decision of this Court in *General Electric Co. v. Jewel* (Appendix page G-4) and we herein quote the same passage:

> "The principle of the Ansonia case plainly would deny validity to the Pipkin patent if the prior art disclosed an electric bulb so frosted on the inside as to round out the angular crevices produced by the first etching, whether the full utility of the bulb had been previously recognized or not. The same result is indicated where, as in the present case, the prior art discloses the method of making an article having the characteristics of the patented product, *though all the advantageous properties of the product had not been fully appreciated.*" (emphasis added).

We agree with the further observations made by Examiner McKelvey (Appendix pages G-4 and G-5) that this Court said, in *Anderson's — Black Rock v. Pavement Salvage Co.*,[3] that "[t]he patent standard is basically con-

[3] 396 U.S. 57, 61, (1969).

stitutional * * *" and a patent must "promote the Progress of * * * [the] useful Arts"[4], and that this Court (quoting *Graham v. John Deere Co.*[5]) laid down the rule that the Congress could not, in enacting 35 USC 103, "authorize the issuance of patents whose effects are to *remove existent knowledge from the public domain*, or to restrict free access to materials already available" (emphasis added) which, as Examiner McKelvey correctly concluded, is the result when a known combination, or a combination which is obvious and thus also a part of the public domain, is held to be unobvious and therefore patentable because of the discovery that it possesses some unforeseen capability.

In the footnote at Appendix page G-5, quoting from *Graham v. John Deere Co.*, supra, Justice Clark speaking for this Court, said:

> "Surely, therefore, the words 'as a whole' in § 103 could not have legislatively overruled the holding in *Jewel v. General Electric.* Moreover, in my opinion, it is doubtful that Congress could constitutionally overrule *Jewel v. General Electric* in view of the standard of patentability demanded by the Constitution as outlined in *Black Rock.*"

CONCLUSION

It is apparent from the above, clearly pointed out by *Ex parte Leonard and Brandes*, supra, that as to the legal question presented by the present Petition, there is

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[4] Article I. § 8 of the Constitution.

[5] 383 U.S. 1, 148 USPQ 459 (1966).

confusion among the courts, and conflict among the Circuits; and, particularly, that the decision by the Seventh Circuit Court of Appeals to which the instant Petition relates is in conflict with the decision by this Court in *General Electric Co. v. Jewel Incandescent Lamp Co.*, supra, and in violation of the constitutional standards enunciated also by this Court in *Anderson's — Black Rock v. Pavement Salvage Co.*, supra, and *Graham v. John Deere Co.*, supra.

Wherefore, it is respectfully requested that Petitioners' Supplemental Brief herewith submitted be considered, and that in view thereof, and for the reasons set forth in the Petition, the instant Petition should be granted.

Respectfully submitted,

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APPENDIX "G"

Patent and Trademark Office
Board of Appeals

Ex parte Leonard and Brandes

Patent issued July 22, 1975
Opinion dated Sept. 19, 1974

PATENTS

1. Claims — Functional — In general (§20.451)

Functional language in patent claims is permissible so long as it sets out and circumscribes particular area with reasonable degree of precision and particularity.

2. Specification — In general (§62.1)

35 U.S.C. 112, first paragraph, requires that specification contain written description of invention that would enable one skilled in art to make and use invention.

3. Patentability — Invention — In general (§51.501)

Patentability — Aggregation or combination — New or better result (§51.157)

Unexpected result obtained from combination of materials that appear prima facie obvious must be taken fully into account, pursuant to Congressional mandate for consideration of invention "as a whole."

4. Patentability — Invention — In general (§51.501)

Patentability — Subject matter for patent monopoly — Process, product and apparatus (§51.613)

Materials on which process is carried out must be accorded weight in determining obviousness of that process.

Particular patents — Underwater Adhesive

3,896,077, Leonard and Brandes, Underwater Adhesive, claims 1 - 23 and 26 of application allowed; claim 25 refused.

Appeal from Group 140.

Application for patent of Fred Leonard and George Brandes, Serial No. 93,903, filed Nov. 30, 1970. From decision rejecting claims 1 - 23, 25, and 26, applicants appeal (Appeal No. 148-67). Reversed as to claims 1 - 23 and 26; affirmed as to claim 25. McKelvey, Acting Examiner-in-Chief, dissenting in part, with opinion.

Irwin M. Aisenberg, Berman, Aisenberg & Platt, both of Washington, D.C., and Charles K. Wright, Jr., for applicants.

Before Schneider and Witherspoon, Examiners-in-Chief, and McKelvey, Acting Examiner-in-Chief.

Witherspoon, Examiner-in-Chief.

This appeal is from the final rejection of composition claims 1 to 21, 23, 25 and 26 and process claim 22, all the claims in the application.

Claims 1, 22 and 25 are reproduced for better understanding of the issues presented:

> 1. A composition having a paste-like consistency and containing, as essential ingredients, (a) at least one b-unsubstituted a-cyanoacrylic acid ester which is liquid at room temperature and atmospheric pressure, the a-cyanoacrylic acid ester consisting of the acyl group $H_2C{=}C(CN)\text{-}CO\text{-}O$- and a group a carbon atom of which is directly bound to the available bond of an oxygen atom of said acyl group, and (b) water-insoluble solid filler which is essentially inert with respect to the a-cyanoacrylic acid ester and insoluble therein, the filler being capable of forming a pastelike consistency with the a-cyanoacrylic acid ester and be-

ing present in the composition in an amount sufficient to form the paste-like consistency.

22. A process for preparing a composition according to Claim 14 which comprises admixing the a-cyanoacrylic acid ester with the filler and any silica until a smooth paste is obtained.

25. An adhesive composition having a paste-like consistency and comprising filler admixed with liquid monomer, the filler being water-insoluble solid filler which forms a paste with the liquid monomer, and is essentially inert with respect to the monomer and is insoluble therein, the composition being capable of a) being applied to a substrate submerged in water, b) adhering together two substrates submerged in water and c) achieving a bond strength between the two substrates of at least 100 pounds per square inch in less than one hour.

The references relied on are:

Joyner et al. (Joyner)	2,784,127	Mar. 5, 1957
Coover et al. (Coover)	2,794,788	June 4, 1957
Lal	2,833,753	May 6, 1958
McManimie	3,442,851	May 6, 1969

I

Claim 25 stands rejected under 35 USC 112 by virtue of the functional statements therein. It is also the Examiner's opinion that "there is no basis in the specification for a claim indicating that all liquid monomers are within the scope of the invention".

[1] We do not agree with the first ground of rejection. There is of course nothing intrinsically wrong with using functional language in patent claims; they are permissible so long as they set out and circumscribe a particular area with a reasonable degree of precision and particularity. Noll v. O.M. Scott & Sons Co., 467 F.2d 295, 175 USPQ 392 (6 Cir. 1972); In re Swinehart, 439 F.2d 210, 169 USPQ 226 (CCPA 1971). We believe that is clearly the case here.

[2] However, we do agree with the Examiner's holding in effect that the specification lacks a written description of the invention which would enable one skilled in the art to make and use the invention, as required by the first paragraph of 35 USC 112. The specification states (page 5) in rather clear terms, "[t]he compositions of this invention contain, as *essential* ingredients, at least one liquid monomer of a class known as a-cyanoacrylic acid esters and at least one *** filler ****." (emphasis added). In view of this statement, we believe that any claim which does not limit the liquid monomer to a liquid a-cyanoacrylic acid ester is unduly broad.

II

Claims 1-23, 25 and 26 stand rejected under 35 USC 103 as unpatentable over Coover and Joyner in view of Lal and McManimie. We are constrained to reverse this rejection.

Although the components of appellants' claimed compositions individually are old, it has not been shown or even urged by the Examiner that the composition itself - a mixture or combination of materials - is also old. The issue for consideration, therefore, is solely that of obviousness.

[3] Joyner teaches adhesive compositions containing a base of b-unsubstituted, a-cyanoacrylate and fillers as are "normally employed". Column 5, lines 29-32. From this it might be said that the combination of materials reflected in appellants' invention, broadly speaking, is prima facie obvious. However, we fail to find any suggestion from the collective teachings before us that a paste mix having the combination of monomer and filler as claimed would be suitable for laminating under water. This is a totally new and surprising beneficial result, bearing in mind particularly the awareness in the art of the water reactivity of a-cyanoacrylate monomers. Such unexpected results must, of course, be taken fully into account, pursuant to the Congressional mandate for consideration of the invention "as a whole". See Graham v. John Deere Co., 383 U.S. 1, 148 USPQ 459 (1966); U.S. v. Adams, 383 U.S. 39, 148 USPQ 479 (1966); Eli Lilly & Co. v. Generix Drug Sales, Inc., 460 F.2d 1096, 174 USPQ 65 (5 Cir. 1972); In re Murch, 464 F.2d 1051, 175 USPQ 89 (CCPA 1972) and cases there cited.

We should note that in so holding with respect to all claims except claim 25, we rely heavily on appellants' representations that all or substantially all of the compositions

claimed in fact possess the desired and unexpected property. We are aware of no good reason to challenge appellants' presumptively accurate disclosure. In re Marzocchi, 439 F.2d 220, 169 USPQ 367, 370 (CCPA 1971).

[4] Our reversal of the rejection of method claim 22 is additionally based on a line of decisions requiring that the materials on which a process is carried out be accorded weight in determining the obviousness of that process. In re Mancy, 499 F.2d 1289, 182 USPQ 303 (CCPA 1974); In re Wadlinger, 496 F.2d 1200, 181 USPQ 826 (CCPA 1974); In re Schneider, 481 F.2d 1350, 179 USPQ 46 (CCPA 1973) and In re Kuehl, 475 F.2d 658, 177 USPQ 250 (CCPA 1973).

III

The decision of the Examiner is affirmed as to claim 25 and is reversed as to claims 1 to 23 and 26. Affirmed-in-art.

McKelvey, Acting Examiner-in-Chief, concurring in part and dissenting in part.

I

I agree, for the reasons given in the majority opinion, that the Examiner properly rejected claim 25 under 35 U.S.C. §112. I also agree with the majority that appellants' use of functional language cannot be regarded as improper.

II

Respectfully, however, I cannot agree with the majority's disposition of the prior art rejection.

The composition claims, with the exception of claim 25, cover an adhesive composition which contains an a-cyanoacrylic acid ester which is liquid at room temperature and a water-insoluble solid filler which is inert with respect to the a-cyanoacrylic acid ester and insoluble therein. Representative fillers meeting this criteria are calcium carbonate, titanium dioxide, zinc oxide, and aluminum silicate.

1. Scope and Content of the Prior Art

The a-cyanoacrylic acid esters used by appellants are known adhesives per se. Coover indicates that the esters may be used as adhesives in dental fillings (column 2, line 49), a use which is common to both the claimed compositions and the prior art compositions (see specification, page 1, line 23). Coover also indicates that the adhesives are capable of being spread upon surfaces which are to be adhered (column 2, lines 11-13 and column 3, line 59).

Joyner, which mentions Coover in at least two places, also discloses the a-cyanoacrylic acid esters used in appellants' compositions. According to Joyner (column 5, lines 29-33):

> "The adhesive compositions can contain any of the other compounding ingredients which are normally employed such as • • • fillers • • • and the like."

The fillers called for by the claims are conventional fillers readily available commercially. Appellants have not contended the contrary, nor could they. There are, of course, fillers other than those called for by the claims which are also available commercially.

2. Differences Between Claimed Subject Matter and Prior Art

The claimed subject matter differs from Joyner in two basic respects: (1) Joyner does not disclose the specific fillers used by appellants and (2) Joyner does not disclose the specific proportions of filler called for by the claims.

3. Level of the Skill of the Art

The record, as it reaches the Board, does not indicate the level of the skill of the art. It is, of course, very difficult in Patent Office proceedings for the Examiner to supply such evidence. I have been able to find, in Kirk-Othmer, Encyclopedia of Chemical Technology, pp. 383 and 386 (2nd Ed. 1963), the following indication of the level of the skill of the art:

> "At the present time there are no all-purpose adhesives that combine all of the desired properties for a wide variety of bonding applications, and it is unlikely that there ever will be such an adhesive. Therefore, adhesives must be fitted to the actual application proposed and the selection of the adhesive from the wide variety available becomes a confusing problem. From a practical standpoint, the potential user of an adhesive will wish to consider several factors in selecting the most suitable adhesive for his purpose. Obviously, he will need to know whether the adhesive will adhere adequately to the adherends involved. Once this has been established, the most important considerations will be: (a) whether the adhesive meets the general levels of strength required by the design and the intended purpose of the joint; (b) whether the adhesive has the desired working properties to be practical in the manufacturing process contemplated; (c)

whether the bond will have both the necessary initial strength and the desired permanence under the expected service conditions; (d) whether the cost is reasonable. The adhesive must not have an adverse effect on the adherends such as corrosion. Since very few adhesives will possess all of the desired properties for a given application, it is usually necessary to make the best possible compromise among the various pertinent properties. Adhesion to the adherend will depend primarily on the forces of specified adhesion previously discussed.

• • •

Fillers are relatively nonadhesive substances added to an adhesive to improve its working properties, permanence, strength, or other qualities. These materials are generally intended to do something useful and not merely reduce cost."

4. Resolution of the Obviousness Question

As the majority indicates, the claimed subject matter broadly speaking might appear to be prima facie obvious.

Appellants have used known liquid monomers, to which they have added conventional and commercially available fillers, to make adhesives. The addition of a known and readily available filler to a known adhesive, in my opinion, is plainly obvious, particularly in view of Joyner which indicates fillers may be added to a-cyanoacrylic acid ester adhesives.

In my opinion, the specific proportions of fillers called for by the claims do not render the claimed subject matter non-obvious, inasmuch as adhesives are normally used in liquid or paste form. Thus, when fillers are to be used in adhesives, the proportion of filler will be such that the adhesive is useable, i.e., the adhesive will be liquid or paste-like, since how else could it have "the desired working properties to be practical in [most processes where adhesives are used]."[3]

I agree with appellants, on this record, one skilled in this art would not have expected appellants' adhesives to be useful under water. However, this unexpectedness does not, in my opinion, render the claimed subject matter, as a whole, non-obvious. On the basis of the prior art, one skilled in this art would surely have recognized that the claimed adhesives are useful "above water" even if that person would not have expected the claimed adhesives to be useful "under water."

The majority reverses, as I understand the decision, because of the "additional" unexpected property which appellants have discovered in what I regard as an otherwise obvious composition. Recent decisions by our appellant court, including In re Murch, 59 CCPA 1277, 464 F.2d 1051, 175 USPQ 89 (1972), cited by appellants and the majority, and In re Costello, 480 F.2d 894, 178 USPQ 290 (CCPA 1973), admittedly provide legal support for the weight the majority gives appellants' "additional" discovery. With all due respect, however, I am unable to reconcile the majority's holding or the holdings in Murch and Costello with General Electric Co. v. Jewel Incandescent Lamp Co., 326 U.S. 242, 67 USPQ 155 (1945).[4] The Supreme Court states in General Electric v. Jewel:

> "The principle of the Ansonia case[5] plainly would deny validity to the Pipkin patent if the prior art disclosed an electric bulb so frosted on the inside as to round out the angular crevices produced by the first etching, whether the full utility of the bulb had been previously recognized or not. The same result is indicated where, as in the present case, the prior art discloses the method of making an article having the characteristics of the patented product,[6] though all the advantageous properties of the product had not been fully appreciated."

The Supreme Court has noted that "[t]he patent standard is basically constitutional • • •" Anderson's-Black Rock v. Pavement Salvage Co., 396 U.S. 57, 61, 163 USPQ 673, 674 (1969). That is, a patent must "promote the Progress of • • • [the] useful Arts • • •." Article I, §8 of the Constitution. Congress could not, in enacting §103, "authorize the issuance of patents whose effects are to

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[3] Kirk-Othmer, supra, p. 383.

[4] See also General Radio Co. v. Superior Electric Co., 321 F.2d 857, 862, 138 USPQ 595, 599 (3rd Cir. 1963); Preuss v. General Electric Co., 392 F.2d 29, 33-34, 157 USPQ 177, 180 (2d Cir. 1968); National Distillers & Chemical Corp. v. Brenner, 128 U.S. App D.C. 386, 389 F.2d 927, 929, 156 USPQ 163, 165 (D.C. Cir. 1967); and In re Prindle, 49 CCPA 882, 886, 297 F.2d 251, 254, 132 USPQ 282, 283-284 (1962).

[5] Ansonia Brass & Copper Co. v. Electric Supply Co., 144 USPQ 11 (1892). Accord: In re Wilder, 57 CCPA 1114, 429 F.2d 447, 166 USPQ 545 (1970); In re Thuau, 30 CCPA 979, 135 F.2d 344, 57 USPQ 324 (1943).

[6] In this case, an adhesive containing an a-cyanoacrylic acid ester and a filler, both of which are known.

remove existent knowledge from the public domain, or to restrict free access to materials already available." Black Rock, supra. Nor can the language "subject matter, *as a whole*" (emphasis added) in §103 alter the constitutional standard.[4]

In my view, the claims on appeal permit appellants to "exclude others from making, using, or selling"[5] the claimed adhesive compositions for use "above water." These claims, therefore, do not measure up to the requisite constitutional standard and cannot be drawn to subject matter which is non-obvious within the meaning of 35 U.S.C. §103.[6]

Claim 22 is a method claim. Inasmuch as the materials used to practice the method were known at the time the invention was made and the method is clearly the conventional method for making adhesives containing fillers, I believe the Examiner properly rejected claim 22. In re Kanter, 55 CCPA 1395, 399 F.2d 249, 158 USPQ 331 (1968). Cf. In re Mancy, 499 F.2d 1289, 182 USPQ 303 (CCPA 1974).

III

For the reasons expressed herein, I agree with the Examiner that appellants are not entitled to a patent containing the claims on appeal. I would therefore affirm.

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[4] In Graham v. John Deere Co., 383 U.S. 1, 148 USPQ 459 (1966), the Supreme Court observed that "[t]he standard [of patentability] has remained invariable in this Court." Surely, therefore, the words "as a whole" in §103 could not have legislatively overruled the holding in Jewel v. General Electric. Moreover, in my opinion, it is doubtful that Congress could constitutionally overrule Jewel v. General Electric in view of the standard of patentability demanded by the Constitution as outlined in Black Rock.

[5] 35 U.S.C. §154.

[6] The question of whether appellants are entitled to a patent claiming a method of using the presently claimed adhesives under water is not before the Board. It is noted, however, that appellants have obtained partial coverage in that respect by the grant of U.S. patent 3,607,542 to them.